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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 OCTAFORM SYSTEMS INC., et al.,

8 Plaintiffs,

9 v.

10 BRUCE JOHNSTON, et al.,

11 Defendants.  
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Case No. 2:16-cv-02500-APG-BNW

**ORDER**

13 Presently before the court is Defendants' Motion for Protective Order Re: Steve  
14 Ehrenpreis & Jedso, Inc. (ECF No. 111), filed on March 25, 2019. Plaintiffs and Third-Party  
15 Defendant David Richardson filed a response (ECF No. 119) on April 8, 2019. Defendants filed a  
16 reply (ECF No. 120) on April 15, 2019.

17 The court held a hearing on Defendants' motion for a protective order on June 4, 2019.  
18 (Mins. of Proceedings (ECF No. 128).) As stated in that hearing, the court denied in part and  
19 granted in part Defendants' motion for a protective order. The motion was denied to the extent  
20 that the depositions of Mr. Ehrenpreis and Jedso, Inc. will not be precluded. The motion was  
21 granted to the extent that these depositions will be limited in scope and certain documents must  
22 be produced before these depositions, as stated during the hearing. The court also took the parties'  
23 requests for sanctions under submission. This Order addresses the parties' requests for sanctions.

24 When a motion for protective order is granted in part and denied in part, the court may  
25 apportion the reasonable expenses for the motion. Fed. R. Civ. P. 37(a)(5)(C). It is within the  
26 court's broad discretion to control discovery, "and its rulings will not be overturned in the  
27 absence of a clear abuse of discretion." *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D.  
28 Nev. 2011) (citing *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988)). The court has

1 considered the parties' memoranda of points and authorities and the arguments presented by  
2 counsel at the hearing regarding sanctions. For the reasons discussed below, the court in its  
3 discretion declines to apportion expenses and will deny both parties' requests for sanctions.

4         On the one hand, the court observes that the motion for a protective order was filed just  
5 days before Mr. Ehrenpreis and Jedso, Inc.'s depositions were scheduled to take place. The  
6 timing of this filing caused Plaintiffs to incur costs that they would have otherwise not incurred.  
7 On the other hand, Defendants provided e-mails showing that they were trying to informally  
8 reach an agreement with Plaintiffs limiting the scope of the deposition up until this motion was  
9 filed. While Plaintiffs were not required to come to an agreement regarding the scope of the  
10 deposition, Plaintiffs have been on notice, at least as of February 20, 2019 (the date on which  
11 Judge Gordon held a hearing on the Motion to Stay) and later through subsequent e-mail  
12 communications, that Defendants would be requesting court involvement regarding the scope of  
13 Mr. Ehrenpreis' deposition if the parties could not come to a mutual agreement. The case was and  
14 continues to be stayed, and Plaintiffs could have waited until this court resolved the motion for a  
15 protective order before attempting to take the deposition.

16         Nevertheless, Plaintiffs had properly subpoenaed Mr. Ehrenpreis, and Mr. Ehrenpreis did  
17 not object to the subpoena. The court does not look favorably on the communications between  
18 defense counsel and counsel for Mr. Ehrenpreis regarding the need for Mr. Ehrenpreis to attend  
19 the deposition, as Mr. Ehrenpreis' attendance at the deposition was compelled by subpoena and  
20 the court had not entered a protective order or stayed the deposition pending resolution of the  
21 motion for protective order. *See* Fed. R. Civ. P. 45(g) (providing that the court issuing the  
22 subpoena "may hold in contempt a person who, having been served, fails without adequate  
23 excuse to obey the subpoena."); *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146,  
24 1158 (9th Cir. 2010) (stating that a non-party's attendance at a deposition is compelled by  
25 subpoena). Despite the Defendants' conduct, Plaintiffs could have determined that the deposition  
26 would still go forward as noticed and move for sanctions against Mr. Ehrenpreis if he did not  
27 attend. Instead, Plaintiffs decided that they would not move forward with the deposition based on  
28 the inconveniences and interruptions to Plaintiffs' counsel's deposition preparation caused by


1 Defendants. Given these competing considerations, the court in its discretion finds that the  
2 parties should bear their own fees and expenses.

3 Beyond the Rule 37 sanctions, Defendants requested sanctions under Federal Rule of Civil  
4 Procedure 45(d)(1) (ECF No. 111 at 10), which provides that “[a] party or attorney responsible  
5 for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or  
6 expense on a person subject to the subpoena. The court . . . must enforce this duty and impose an  
7 appropriate sanction . . . on a party or attorney who fails to comply.” As stated at the hearing, the  
8 court finds that Plaintiffs did not impose an undue burden or expense on non-parties Steve  
9 Ehrenpreis or Jedso, Inc. by subpoenaing them for their depositions. This is most clearly  
10 evidenced by the fact that they did not object to their subpoenas. To the extent Defendants argue  
11 the depositions caused them undue burden or expense, the court addressed that concern by  
12 limiting the scope of the depositions as stated at the hearing.

13 As to Plaintiffs and Richardson’s request for sanctions, they did not file a stand-alone  
14 motion, but the court nevertheless has considered their argument that Defendants and their  
15 counsel should be sanctioned for intentionally interfering with Plaintiffs’ subpoena. (ECF No.  
16 119 at 20.) While Plaintiffs and Mr. Richardson cite persuasive authority that condemns  
17 interference with subpoenas issued to non-parties, the court in its discretion declines to sanction  
18 Defendants for the reasons discussed in this order.

19 IT IS THEREFORE ORDERED that the parties’ request for sanctions is DENIED. It is  
20 further ordered that each party must bear its own costs and fees related to Defendants’ motion for  
21 a protective order.

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23 DATED: June 7, 2019

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26 BREND A WEKSLER  
27 UNITED STATES MAGISTRATE JUDGE  
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